Supreme Court, U.S.
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No. 95 - 2024

In The
Supreme Court of the United States
October Term, 1996

C. Martin Lawyer, III,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, *et. al.*,

Appellees.

On Appeal From The United States District Court For The Middle District Of Florida

BRIEF ON THE MERITS FOR APPELLANT

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63 pp

QUESTIONS PRESENTED

1. **Whether the District Court's Redistricting Order which was produced by a privileged mediation process, is an invalid exercise of remedial power which circumvented the Florida Legislature and Florida Supreme Court in violation of the doctrine of separation of powers and federalism.**

2. **Whether redistricting Settlement Plan 386 of Florida Senate District 21 violates the Equal Protection Clause of the United States Constitution by deliberately classifying voters on the basis of race as a result of the District Court's failure to apply the proper legal standards required by in *Miller v. Johnson* and by failing to comply with strict scrutiny.**

PARTIES TO THE PROCEEDING

The following party is one of the Plaintiffs below and is the Appellant before this Court:

C. Martin Lawyer, III

The following Parties were other Plaintiffs below and are Appellees before the Court:

Robert Scott

Edna Simms

Earl James

The following parties were Defendants below and are Appellees before this Court:

United States Department of Justice

State of Florida

The following parties were Intervenors below and are Appellees before this Court:

Florida Senate

Florida House of Representatives

Florida Secretary of State

James T. Hargrett, Jr.

Moease Smith and others who reside in the general geographic area of Tampa Bay

References to the Record are:

R-[Docket Number]-[page number]

J. A. [page number]

J. S. -- Jurisdictional Statement

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

UNITED STATES STATUTES

LOCAL FEDERAL RULE

FLORIDA CONSTITUTION

FLORIDA STATUTES

OTHER AUTHORITIES

OPINION BELOW

The opinion of the three-judge district court entitled "Final Order" was entered on March 19, 1996,(R. 196) and is reported as *Scott v. United States Department of Justice*, 920 F. Supp. 1248 (M.D. Fla. 1996) (hereafter "J.A." at 195-209).

JURISDICTION

The Final Order of the three-judge district court from which appeal is taken directed the apportionment of District 21 and surrounding districts of the Florida Senate -- a statewide legislative body within the meaning of 28 U.S.C. § 2284(a). Direct appeal from such an order is authorized by 28 U.S.C. § 1253; and 28 U.S.C. § 2101 prescribes a 30-day limit for taking the appeal. The Notice of Appeal filed April 16, 1996 herein is timely. (R. 205) (J.S. App. A at 1a - 2a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> Sec. 1 ...nor shall any State...deny to any person within its jurisdiction the equal protection of the laws.

The Tenth Amendment to the Constitution of the United States provides, in relevant part:

> The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article III, Section 16, Florida Constitution (1968) is set forth in its entirety in Appendix A to this Brief at 1a - 2a.

STATEMENT OF THE CASE

A. Background

The Florida State Senate districting plan that is challenged in this lawsuit grew out of the redistricting process and federal-court litigation that followed the 1990 census. *See, Johnson v. DeGrandy*, 114 S.Ct. 2647, 2651-52 (1994). On April 10, 1992, the Florida Legislature adopted Senate Joint Resolution 2G (SJR 2G) reapportioning the State's 40 Senate Districts (Plan 267) and 120 House Districts (Plan 268). On May 13, 1992, the Florida Supreme Court approved the Plans, as provided by Article III, Section 16(c), of the Florida Constitution. *In re Constitutionality of SJR 2G*, 597 So.2d 276 (Fla. 1992); *see Johnson*, 114 S.Ct. at 2651.

In addressing the implications of the Voting Rights Act, the Florida Supreme Court noted that the apportionment plan included "13 black majority House districts throughout the state where larger and compact populations exist" 597 So.2d at 282 and "2 black majority population Senate districts." 597 So.2d at 283.

The Florida Supreme Court retained "exclusive jurisdiction to consider any and all future proceedings relating to the validity of this apportionment plan." 597 So.2d at 286.

The Florida Attorney General then submitted the plans to the United States Department of Justice for pre-clearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. Five Florida counties, including Hillsborough, are subject to the pre-clearance requirements of Section 5. On June 16, 1992, the Justice Department denied pre-clearance, objecting to the Senate plan.

On June 25, 1992, after state officials indicated that they did not intend to convene the legislature in an extraordinary apportionment session, the Florida Supreme Court adopted an amended plan designed to address the Justice Department's objection. *In re Constitutionality of SJR 2G*, 601 So.2d 543, 544-47 (Fla. 1992); *Johnson*, 114 S.Ct. at 2652 n. 2. The Florida Supreme Court stated

that the original Senate apportionment plan contained no districts in the Hillsborough County area in which the total number of black and Hispanic persons constituted more than 40.1% of the voting-age population. The court continued as follows:

> In order to create an appreciably stronger minority district, it was evident that at the very least it would be necessary to combine minority population in Hillsborough and Pinellas Counties. The legislature had concluded that it was inappropriate to do this because these areas are separated by Tampa Bay and because they lack economic ties and political cohesiveness. However, the Justice Department rejected these and other legislative justifications and determined that the Senate plan with respect to the Hillsborough County area violated the Voting Rights Act. Specifically, the Justice Department pointed out that "there are no districts in which minority persons constitute a majority of the voting age population." 601 So.2d at 545.

The Court stated that it had an obligation to redraw the plan pursuant to Article III, Section 16 of the Florida Constitution. The Court noted that it had previously retained jurisdiction to entertain objections to the original legislative reapportionment and rejected Miguel DeGrandy's assertion that the federal district court had jurisdiction. The Florida Supreme Court stated that "the reapportionment of state legislative bodies is not a power delegated by the Constitution of the United States to the federal government" but is a "power reserved to the states" under the Tenth Amendment. *Id.*

As a result of the Florida Supreme Court's decision, District 21 (Plan 330, the plan challenged in the present suit) had a black voting age population 45.0%. The district included parts of Hillsborough, Pinellas and Manatee Counties. It reached out across Tampa Bay to include portions of Pinellas County. In its decision approving District 21 the Florida Supreme Court noted that the NAACP had objected to the configuration because it "goes too far" 601 So.2d at 548.

The NAACP stated as follows:

> 'This plan's proposed minority district for the Tampa Bay area lacks geographic compactness.' and that it 'places virtually all black residents in the four-county area into the minority district, thereby substantially diminishing the opportunity for blacks to influence elections in the surrounding districts.' 601 So.2d at 548.

The Florida Supreme Court observed that the plan was "more contorted than the others because it reaches farther." 601 So.2d at 546. The court also observed that none of the proposed plans could be considered compact because "in creating a strengthened minority district it is necessary to extend fingers in several directions in order to include pockets of minority voters." 601 So.2d at 546. The court stated that that community of interest must give way to "racial and ethnic fairness." 601 So.2d at 546.

The result of the 1992 redistricting was chaos. According to the Chief Attorney in the Florida Department of State, Division of Elections, many voters were "uncertain about which districts they lived in." People "voted in elections in which they had no legal interest..." "Some candidates erroneously 'qualified' to run for office in districts in which they were not permitted to run." J.A. at 141.

A copy of the map of District 21 (Plan 330) is found in Appendix B to this Brief at 3a and at J.S. App. D. At 29.

B. Proceedings Below

The April 14, 1994 Complaint to declare unconstitutional Florida Senate District 21 as a product of unlawful racial gerrymandering (R. 1) was filed by Appellant and five other plaintiffs, all of whom were then represented by the law firm of Foley & Lardner. (R. 1 at 7) For purposes of this appeal, the relevant portions of the Complaint's allegations were:

> 12. Senate District 21 was deliberately drawn in an irregular fashion in order to ensure that at least fifty-one percent (51%) of the population of the district was comprised of minorities. Senate District 221 was...drawn specifically to encompass members of minority groups with divergent interests residing in several different communities....
>
> 13. The configuration produced by the Reapportionment Plan is so irregular that it clearly cannot rationally be understood as anything other than an attempt to segregate the races for purposes of voting.... (R. 1 at 13)

Appellant is of the Caucasian/White race and resides within both the district challenged in the Complaint and within the "Settlement Plan" 386 ordered by the District Court. *See, United States v. Hays*, 515 U.S.____, 115 S.Ct. (1995). One of the original plaintiffs died; another moved out of the area. The only other plaintiffs (Robert Scott, Edna Sims, and Earl James) are all of the African-American/Black race and reside outside (across the street from) the district challenged in the Complaint but within the Settlement Plan district challenged.[1] Thus Appellant was the only party with standing under *Hays* to challenge District 21's constitutionality.

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[1] The Complaint's prayer for relief asked that the Court "(a) enter a declaratory judgment that the Reapportionment Plan [Plan 330] violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; (b) enter an Injunction prohibiting the State of Florida from holding any future Senatorial elections based on the 1992 redistricting plan; [and] (c) [e]nter an order requiring the State of Florida to reconfigure the Senatorial Districts in the State of Florida to comport with traditional districting princip[les] of contiguity, compactness, and communities of interest, thereby eliminating the racial gerrymandering which brought about the current senatorial districting plan." Complaint at 6.

The named defendants were the State of Florida and the United States Department of Justice. (R. 1)

Notice was given the Chief Judge of the Eleventh Circuit of a request for a three-judge district court. (R. 3) On May 2, 1994, an order was entered designating a three-judge court. (R. 7)

On January 30, 1995 the United States District Court granted the Florida Senate's motion to intervene. (J.A. at 195) Subsequently, the court permitted the following four additional non-parties to intervene: 1) Florida House of Representatives; 2) Florida Secretary of State; 3) James T. Hargrett, Jr., incumbent Senator, District 21; and 4) Moease Smith and others, all African-American or Hispanic residents living in the general area who had participated in prior redistricting lawsuits. (J.A. at 195)

On July 6, 1995 a status conference was held before Judge Merryday. (R. 75) During that conference, counsel for Senator Hargrett and the private appellees indicated that if Plan 330 were rejected that another plan would be adopted by the State of Florida. (R. 134 at 19-20) Counsel noted that if the State of Florida did adopt a plan it would be the subject of the eventual approval by the court at a remedy proceeding. (R. 134 at 20) Counsel for the Florida Senate stated that the Court could "order the State to go back to the drawing boards and reconfigure a district." (R. 134 at 29). Counsel for the House of Representatives stated that the House wanted to "preserve the legislative prerogative of redistricting implicit in Article III, Section 16 [of the Florida Constitution]. (R. 134 at 30).

At this status conference counsel for the Florida Senate suggested mediation as a means of resolving the dispute. Based on these comments the District Court concluded that mediation offered a "preferable and feasible alternative to the uncomfortable intervention inherent in federal judicial resolution of issues affecting state government." (J.A. at 197).

Following the status conference on July 14, 1995 the court entered an order stating that there did not appear to be any present intent on the part of the Florida Legislature to amend the reapportionment plan. The court submitted the action to mediation. (R. 78) The Local Rules of the United States District Court for the Middle District of Florida provide that "all proceedings of the mediation conference ... are privileged" and the proceedings "may not be reported, recorded, placed into evidence, made known to the trial court or jury...." Appendix B to Brief Opposing Motion to Affirm. A trial was scheduled on "liability" and on "remedies". (R. 78)

The Florida House of Representatives moved to intervene (R. 72) which motion was opposed by the Florida Senate (R. 83) and the Department of Justice (R. 89). On July 26, 1995 the District Court denied the House's Motion to Intervene for the reason that it had not aligned itself with the Plaintiff or the Defendants. (R. 96)

On July 26, 1995, the District Court entered an amended order referring the case to mediation. (R. 97) On July 27, 1995 the Secretary of State filed a Motion to Intervene (R. 99) which was initially denied without prejudice to renew at the "remedy stage". R. 119). On August 3, 1995 the House of Representatives elected to appear as *amicus curiae*. (R. 114)

On September 6, 1995 a purported settlement agreement which had been signed by some of the parties to the action was filed with the court. (R. 131) The House of Representatives and the Secretary of State were not signatories to the purported settlement agreement.

On September 12, 1995 Appellant C. Martin Lawyer, III filed a Motion to Disapprove the settlement agreement. (R. 138)

On September 27, 1995 a status conference was held before the three-judge panel. (R. 150) At that hearing Appellant Lawyer appeared on his own behalf. (R. 159 at 6) At the status conference Chief Judge Tjoflat stated that the Florida Legislature had the responsibility of fashioning a redistricting plan which comported with the Constitution. (R. 159 at 12) Chief Judge Tjoflat questioned the attorney for the Florida Senate regarding his authority to represent the Senate. Attorney Hill stated that by "tradition" the President of the Senate speaks for the Senate in the absence of a

convened session. (R. 159 at 13). At this same status conference counsel for the House of Representatives stated that House Rule 2.4 "gives the speaker that litigating authority under the Florida House rules and procedures." (R. 159. at 15)

Chief Judge Tjoflat indicated that he was inquiring because the court had "received one letter from a senator that was written ex-parte." Chief Judge Tjoflat stated as follows:

> Any ex-parte communications to the court written by anybody will be given to the clerk, *made part of the record*, furnished to all of the parties, and acknowledged--the sender--the letter will be acknowledged by the clerk directly to the sender. We are not communicating in an ex-parte fashion with anybody. (R. 159 at 13)(emphasis added)

Although the letter, from Florida Senator Howard Forman dated September 21, 1995 and addressed to Chief Judge Tjoflat, was inexplicably not made an exhibit, it was placed in the court file in Volume 6 on the left side where it remains. That letter is reproduced in Appendix A at 1a to the Brief Opposing Motions to Affirm.

Chief Judge Tjoflat further stated that if there is a violation of the Equal Protection Clause:

> ...then it seem to us that the--given that the Florida legislature has the obligation under Florida law to draw districting plans, that our response, our remedy, first, would be to direct the legislature to do so, rather than to have the court do that. That's in keeping with traditional jurisprudence. And we are not going to depart from that. (R. 159. at 14)

Regarding the September 1, 1995 purported settlement agreement which had been filed on September 6, 1995 (R. 131), Chief Judge Tjoflat stated that the court would not "entertain any settlement proposal that is not advanced by all of the parties" or which did not "deal with liability". (R. 159 at 34)

Although Judge Merryday had previously denied the motions to intervene filed by the Florida House of Representatives and the Secretary of State (R. 96 and 119) the three-judge panel made both the Speaker of the House of the Florida House of Representatives and the Secretary of State parties for all purposes at the hearing. (R. 159 at 15, 20, 30)

On July 31, 1995 the Scott plaintiffs filed a motion for summary judgment. (R. 103) The Department of Justice filed a Motion of Summary Judgment on August 1, 1995. (R. 113) On September 25, 1995 the Attorney General filed a "Notice of Significant Legal Issues Pertaining to Judicial Review of the Proposed Settlement Agreement." (R. 146) In said Notice the Attorney General urged the court to resolve several legal issues prior to taking any legal action the proposed settlement. Specifically, the Attorney General stated that federal courts are barred from intervening in state apportionment in the absence of a violation of federal law; the parties to a settlement agreement cannot settle litigation by agreeing to disregard valid state laws. There must be a sufficient factual basis to support a finding of liability; once a federal court has determined that a apportionment plan violates the United States Constitution or federal law, the federal court should defer to the state's system. (R. 146)

On September 26, 1995 Helen Gordon Davis, a former State legislator, filed her opposition to the proposed mediation plan. (R. 147) Her notice of objection noted that there had been no determination as to whether Plan 330 was invalid or unconstitutional; that the mediated plan was negotiated in secret in violation of the principles of the Florida Sunshine Law, Chapter 286 Florida Statutes; that the United States Department of Justice was permitted to participate in drawing a mediated apportionment plan; that the reapportionment may only be accomplished by the Florida legislature; that the Florida Senate cannot agree to anything without open debate and action by the entire body.

On October 2, 1995 Judge Merryday returned, unfiled, a letter from Florida Senator Howard Forman which had been

addressed to Judge Merryday. (R. 152) The letter is attached to his order returning the letter to Senator Forman. (R. 152)

On October 20, 1995 C. Martin Lawyer, III, and Foley & Lardner, his previous attorneys, filed a joint motion to substitute Lawyer as attorney for himself. (R. 162) The Department of Justice opposed his motion stating that he did not have standing and that he would make negotiations more complex. (R. 164)

On October 26, 1995 another status conference was held before Judge Merryday. (R. 171). At that conference the mediator declared an impasse in the settlement negotiations. (R. 180 at 7-8) During the conference Appellant stated that "I mean that I agree it is more appropriate, if a violation is found, that the legislature consider it in full body." (R. 180 at 30). Appellant further stated that if there could be an agreement that if the district does violate the equal protection clause and "that we would agree to ask the three-judge court to remand it to the legislature and retain jurisdiction, so that then the three-judge court would be in a position of reviewing whatever it was the legislature did." (R. 180 at 37)

On November 2, 1995 all parties except Appellant signed a settlement agreement which was filed with the District Court on November 6, 1995. (R. 131) In the agreement the defendants denied the assertion that District 21 violated the Fourteenth Amendment. These parties stated that, in order to avoid protracted litigation, they agreed to modification of Senate Redistricting Plan 330 in the manner detailed in Plan 386 as depicted in Appendix A to the Settlement Agreement. (R. 169)

On November 2, 1995 a pre-trial conference was held before Judge Merryday. (R. 171) At that pre-trial conference Appellant Lawyer represented himself. (R. 180 at 4) A copy of the "Settlement Agreement" had been submitted to Judge Merryday. The Attorney for the Scott plaintiffs advised the court that it "resolved the case except for Mr. Lawyer's objection to the remedy that the parties have agreed to." (R. 180 at 6) The attorney for the Florida Senate stated that "we believe that, by virtue of that document and what we have agreed to in that document, this case with respect to the liability

issue is settled and that all of the parties, with the exception of Mr. Lawyer, have signed off on a remedy." (R. 180 at 7).

Counsel for the Florida Senate further stated that "we believe that it is settled even involving Mr. Lawyer as a Plaintiff" because in Mr. Lawyer's pre-trial statement Mr. Lawyer had stated that "the only issue which should remain for the court to decide at trial on this matter is the issue of the appropriate remedy." (R.180 at 8). The attorney for the Florida Senate referred to the document as a "provisional settlement" which recognizes that Plan 330 would be "[illegible]oned" and that a new plan 386 be "adopted" and that a fairness hearing be ordered to take place wherein the public could come in, including Mr. Lawyer, and comment about the remedy. (R. 180 at 11)

Appellant stated that it was not appropriate for Judge Merryday to approve a conditional settlement, that there was no admission that the current district violated the Equal Protection Clause. (R. 180 at 13) Appellant stated as follows:

> So what I would ask the court to do, and it is entirely appropriate for the court to ask what we're proposing or what is being proposed, is to not treat the motion or the request for settlement as relevant, because it is not consented to by all parties, and proceed to the pretrial. I'm prepared to go forth in trial on this.
>
> *If there is a stipulation among all parties present and all parties have the authority and power to do that*, to stipulate that the current district does violate the equal protection clause of the Fourteenth Amendment of the United States Constitution, then I would agree in part with what Mr. Hill says, which is that we would then proceed to a remedy phase. But I certainly would object to the manner in which it would proceed.

> I would submit that it would be -- well, that the court would -- may very well, as Judge Tjoflat seemed to indicate, defer to the State of Florida in some other fashion, perhaps this would be appropriate, but that that would be for the court to decide. (R. 180 at 15-16) (emphasis added)

When asked if the "fairness hearing" would be "evidentiary in nature" with "full evidentiary presentation" Judge Merryday indicated "No."

Following the pre-trial conference, Appellant filed a Motion and Memorandum in Support to Approve Proposed Redistricting Plan "Lawyer-sen" (R. 172) and a Motion with Memorandum in Support for Partial Summary Judgment *Before* Considering Approval Vel Non of Proposed Settlement agreement (R. 173)(emphasis in original). Appellant also filed three original maps. (R. 174) On November 13, 1995 Appellant filed a Motion to Disapprove November 2, 1995 "Settlement Agreement". (R. 178) On November 17 the Florida Senate filed a map and statistical data of Settlement Plan 386 with the District Court. (R. 187) A copy of the map is included in Appendix C to this Brief at 4a and at J.S. App. E at 30a.

Following a notice of hearing disseminated to the public (R. 179), a "fairness hearing" was held on November 20, 1995 before the three-judge panel (R. 194; J.A. 155-194). Chief Judge Tjoflat stated that the fairness hearing concerned the settlement proposed by the State Defendants and the Plaintiffs with the exception of Plaintiff Lawyer. (J.A. at 158) The Chief Judge stated that the settlement proposal was the "product of the legislature informally..." (J.A. at 158) The court stated that the posture of the case was that the court was "assuming a case of liability" "so the question becomes whether the plan as submitted by the State Defendants pass as constitutional muster or in any respects is invalid." (J.A. at 158) Appellant Lawyer represented himself at the hearing. (J.A. at 159)

The attorney for the Florida Senate stated that although the Florida House and Senate were not in session they have "signed off

on the settlement agreement." No sworn testimony was taken at the hearing. The State Defendants filed a Declaration of John Guthrie, a bureaucrat employed by the Florida Senate. (J.A. at 25) According to the Declaration, the new District 21 (Plan 386) reduced the Black V.A.P. from 45% to 36.2%: the Polk County "finger" was eliminated; the end to end distance was reduced by 37% to less than 50 miles; and the outer boundary was reduced by 58% (J.A. at Tab 2, pp. 39-41 and Tab 4, pp. 45-46) Mr. Guthrie's Declaration stated that "Plan 386 was the *product of court-ordered mediation and subsequent settlement negotiations in which the concerns of various parties were addressed.* (J.A. at 25) (emphasis added)

Mr. Guthrie's Declaration further stated that the Florida Legislature had "obtained sophisticated computer hardware and software" which when combined with "census data", "gave decision makers unprecedented latitude to custom design and fine tune districts." (J.A. at 27 n.2) Mr. Guthrie was present at the "fairness hearing" but did not testify. Chief Judge Tjoflat stated that Guthrie's Declaration was his direct testimony and that the Court would have Mr. Guthrie testify if someone wished to examine him . (J.A. at 171-172)

Attorney Hill stated the Speaker of the House had filed an affidavit declaring that the speaker had signed off on the agreement and attorney Hill represented to the court on behalf of the Florida Senate that the president of the Senate had the authority to sign the settlement agreement and in fact had authorized attorney Hill to sign the agreement. (J.A. at 162) Attorney Hill stated that there is a "reasonable factual and legal basis for the advancement of this claim" and that assuming that there was no constitutional infirmity in Plan 386 all of the Defendants would not contest the factual underpinning to the constitutional violation. (J.A. at 162-163)

Appellant Lawyer asked the court to rule on his motion for summary judgment. Chief Judge Tjoflat stated that it did not make a difference whether the court granted the motion or not. He stated "there is a plan here -- if we granted your motion, we would be in this precise posture we are in now." Chief Judge Tjoflat stated as follows:

> At our earlier status conference in September we said that if we found liability we would charge the legislative branch of the state with the responsibility of coming forth with a plan. So if we went through a trial on the merits and found liability, they would have been doing, in response to our judgment, in a bifurcated trial, precisely what they have been doing already. And they have now presented a plan as a remedy for the alleged constitutional violations. (J.A. at 173-174)

Appellant pointed out that the defendants have argued that if their plan is not acceptable they want to be able to contest the liability aspect of it. (J.A. at 174)

Appellant stated that the court was in a position to ask the representatives of the Florida House and Senate as to why the proponents of the plan went beyond the central part of Hillsborough County. (J.A. at 175) Appellant reviewed the statistics regarding the composition of the district as well as the map of Plan 386. (J.A. at 177-178) Appellant stated that counsel for the House and Senate were at the "fairness hearing along with Mr. Mulroy representing the Department of Justice. (J.A. at 178) Appellant Lawyer stated that it was "obvious from Mr. Mulroy's statements to me that were not confidential ... that my plan ... was unacceptable because there weren't enough Black people in it, the percentage just wasn't high enough. He said that in front of a number of people." (J.A. at 178-179)

Appellant Lawyer stated that the representative of the Justice Department stated that race was the overriding factor. (J.A. at 184) Chief Judge Tjoflat stated that Appellant was free to put on any evidence that he had that race was the deciding factor in the fashioning of Plan 386. (J.A. at 185) Mr. Lawyer stated his intention to call as witnesses each of the attorneys for each of the parties to ask them "because they are the ones that did the plan, did they not?" (J.A. at 186) Appellant then called Justice Department Attorney Mulroy as a witness. Chief Judge Tjoflat stated that Mr. Mulroy's testimony would be irrelevant. (J.A. at 187) Mr. Lawyer responded

that it would be relevant because he participated. (J.A. at 187) Mr. Lawyer stated "If there's any representations whether it is of counsel, it would be the best evidence of that would not be testimony from which the legislature relied, but the actual statements of persons representing the legislature. (J.A. at 187) Mr. Mulroy was not called as a witness but Mulroy stated that the statements that he made to Mr. Lawyer were made during mediation sessions. (J.A. at 192) Mr. Mulroy stated that the Department of Justice did participate in the mediation sessions, but that the plan emanated from "state parties." (J.A. at 193) Mr. Mulroy denied ever stating during confidential mediation sessions or otherwise that race was the overriding factor in the configuration of Plan 386 and that the United States would object to having him testify in this case. (J.A. at 193)

Appellant Lawyer reviewed the demographics and map (J.A. at 176-179) and stated that the map and statistics demonstrated that Plan 386 was the "product of race-based districting." (J.A. at 185)

At the conclusion of the hearing the court took the matter under advisement. The Court's "final order" of March 19, 1996 (discussed in detail, *infra*) approved the settlement plan. (J.A. at 196) This timely appeal followed on April 16, 1996. (R. 205)

C. The District Court Decision

After summarizing the aforementioned procedural history, the District Court stated that because the parties stated that they "anticipated no spontaneous effort by the State of Florida to alter District 21 in response to Miller" that based on the suggestion of the attorney for the Florida Senate of the possibility of mediation the "court concluded that mediation offered a preferable and feasible alternative to the uncomfortable intervention inherent in federal judicial resolution of cases affection state government." (J.A. at 197) The court stated that its Order was

> in the nature of a hybrid consent decree that disposes of liability by consent and affords a remedy resulting from a partial settlement and an adversary

hearing similar to a fairness hearing. (J.A. at 207, n.4)

The District Court stated that its order "emanates from the proceedings on November 20 at which the parties asked this court to authorize a restatement of the boundaries of District 21". (J.A. at 198)

The District Court stated that the case presented a "sufficient evidentiary and legal basis to warrant bona fide intervention of a federal court into matters typically reserved to a state". (J.A. at 199) The Court stated:

> In that circumstance, the State of Florida, the plaintiffs, and other participants may propose a resolution to this action without a dispositive, specific determination of the controlling constitutional issue. In other words the State of Florida is at liberty, acting through its lawfully empowered officials, to consent to a legislative districting adjustment if (1) a material constitutional issue exists (that is, if a plausible and fairly contestable legal or factual issue underlies the dispute) and (2) the state prefers to act volitionally to avert both an expensive and protracted contest and the possibility of an adverse and disruptive adjudication. (J.A. at 199)

The District Court noted that the Defendants did not admit liability but only admitted "for the purpose of settlement only that a reasonable, factual, and legal basis exists for the constitutional claim..." (J.A. at 201, n.3) The Court also noted that the defendants had agreed "for the purpose of settlement only that based on the record, there is a reasonable factual and legal basis for the plaintiffs' claim". (J.A. at 201, n.3)

The Court noted that Appellant Lawyer had "demanded an adjudication that District 21 is composed unconstitutionally" (J.A. at 199, n.2) The Court concluded that under these circumstances the law allows for a consensual remedy "in the absence of a public mea

culpa by a litigant" (J.A. at 199, n.2) and "no specific adjudication of unconstitutionality is necessary". (J.A. at 201, n 3)

The Court further noted that the parties other than Appellant Lawyer entered into the settlement (J.A. 201, n.3), and that Appellant Lawyer objected to the "proposed resolution" (J.A. at 197, n.1) However, the Court stated a "court cannot act as a hostage to private interests." The Court concluded: "Plaintiff Lawyer's complaint sought to have the State of Florida replace District 21 with a constitutional district. He got it." (J.A. at 199-200, n.2)

The District Court proceeded to discuss the characteristics of then-current District 21. (J.A. at 202) The court concluded that measured against the standard prescribed by *Miller v. Johnson*, 515 U.S. _____, 115 S.Ct. 2475 (1995), the pleadings presented a justiciable dispute which implicated important governmental interests which the parties were at liberty to settle. (J. A. at 203-204)

The Order then discussed Plan 386 (Settlement Plan). The Order recited that the "community issue[2] was "prominent" because

> part of proposed District 21 is physically separated by a natural geological peculiarity (Tampa Bay) from the balance of the proposed district and because more than one county is included in proposed District 21. (J. A. at 203-204)

The Court noted that this was a "stubborn problem" and, after discussing this issue concluded that a community is defined by the "consent" of its members. (J.A., *separately*, at 204, 206) The lower court concluded that because none of the other residents had objected to Plan 386 at the "fairness hearing" that the residents of the district "regard themselves as a community and experience consider-

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[2] *i.e.*,the "community of interest" element of traditional race-neutral districting principles approved by this court in *Miller, supra*, 115 S.Ct. 2490.

able with the resolution." (J.A. at 205-206) The Court concluded as follows:

> Therefore, the conclusion is obvious that the plaintiffs sufficiently allege a cognizable, constitutional dispute concerning present District 21 which bears at least some of the conspicuous signs of a racially conscious contrivance. On the other hand, it is equally obvious that a cognizable, constitutional objection to the proposed District 21 is not established. In its shape and composition, proposed District 21 is, all said and done, demonstrably benign and satisfactorily tidy, especially given the prevailing geography. (J.A at 205)

The District Court then devoted the remainder of its opinion to expressing the view that deference should be given to the State legislature in districting matters. (J.A. at 206-208) For example, at J.A. at 206, the court stated,

> ...the limited role of the federal court is to ascertain whether the legislatively described district is among that boundless number of possible and constitutional districts and not among the equally boundless number of possible and unconstitutional districts.

The court then noted, without citing any statistics, that Plan 386 is "racially less recognizable and distinctive" than Plan 330, the plan challenged by the Complaint. (J.A. at 206-207) The Court stated and the new plan reduces the percentage of minority constituents and more closely approximates the racial features of the larger geographic region surrounding Tampa Bay. (J.A. at 207) The boundaries of Plan 386 are "less strained and irregular" than present District 21. (*Id.*)

Thus, the District Court concluded,

> ...Plan 386 offers to any candidate, without regard to race, the opportunity to seek elective office and both

> a fair chance to win and the usual risk of defeat--neither of which is properly coerced or precluded by the state, the court, or the Constitution. (J.A. 207)

The District Court made no findings of fact regarding the basis for the placement of the boundaries. No mention was made in the Final Order of the contents of the Guthrie Declaration. The District Court did not cite any statistical or demographic data supplied by the Appellant or the settling parties.

The Order concluded by finding that the legislature's view controlled, and that based on the Court's "limited review" Plan 386 passed any pertinent test of constitutionality and fairness. (J.A. at 207) The court approved Settlement Plan 386 and modified District 21, effective immediately. (J.A. at 208) A Notice of Appeal was timely filed on April 16, 1996. (R. 205)

SUMMARY OF THE ARGUMENT

Appellant Lawyer is a Caucasian voter who resides in Florida's Senate District 21. Appellant filed suit in United States District Court challenging District 21 as being a racial gerrymander in violation of the Equal Protection Clause under *Shaw v. Reno (Shaw I)*, 509 U.S. ____, 113 S.Ct. 2816 (1993). This District had been created by the Florida Supreme Court in order to overcome the objections of the Justice Department that Florida's apportionment plan did not contain enough black majority voting districts. Because the Florida Legislature did not spontaneously redistrict District 21 after this Court's decision in *Miller v. Johnson*, 515 U.S. ___, 115 S.Ct. 2475 (1995) the District Court concluded that mediation offered a "preferable alternative to adjudication," the District Court submitted the case to mediation. During mediation the attorneys for the Florida Senate, Florida House and Department of Justice agreed in confidential sessions to a settlement which did not admit liability but redrew the boundaries of District 21 in the form of Plan 386. Appellant Lawyer refused to sign the Settlement Agreement, moved to disapprove it and objected to Plan 386.

After a "fairness hearing" the District Court restated the boundaries of District 21 and approved Plan 386 at the invitation of the consenting parties. At no point did the Florida Legislature debate or vote on the boundaries of Plan 386 as required Article III, Section 16, Fla. Const. Nor, in the absence of legislative action, did the Florida Supreme Court create the district as required by Article III, Section 16(f) of the Florida Constitution. (1968)

The District Court failed to independently and adequately adjudicate the constitutionality of Plan 386 by applying the analysis by *Miller v. Johnson*. The District Court acknowledged that it had conducted only a "limited review" of Plan 386 because it was the "will of the legislature." However, Plan 386 is indeed a racial gerrymander under this Court's decisions in *Shaw I & II, Miller, and Bush v. Vera*, 517 U.S. ___, 116 S.Ct. 1941 (1996).

It is bizarre in shape. It reaches south from Hillsborough County to Manatee County where it crosses Tampa Bay to Pinellas County in order to include pockets of Black voters in the district. Its configuration is unexplainable on any grounds other than race. In fact, the District Court made no findings of fact regarding the justification for Plan 386's clear departure from the traditional districting principles of shape, compactness, respect for political subdivisions, contiguity, and community of interest. Although Appellant Lawyer submitted compelling statistics to show that the Settlement Plan violated these principles, the District Court did not even discuss the statistics.

In crossing Tampa Bay, Plan 386 perpetuated the central feature of District 21 which the Florida Supreme Court had been forced to create in order to satisfy the objection of the Justice Department that there were no districts in the Hillsborough County area in which minority persons constituted a majority of the V.A.P.

The final order approving Plan 386 constitutes an invalid consent decree because the order accomplished what the settling parties could not have accomplished privately: the creation of a new voting district without legislation and judicial approval by the

Florida Supreme Court as required by Article III, Section 16 of the Florida Constitution.

The District Court's submission of the case to mediation resulted in an invalid consent decree which approved a reapportionment plan in circumvention of Florida's constitutional procedure and without a proper adjudication of the constitutionality of the plan in accordance with this Court's decision in *Miller*. In the instant case the District Court purported to defer to the Florida legislature but at the same time pre-empted the proper functioning of the legislative process and judicial review by the Florida Supreme Court. As a result the doctrine of separation of powers and principles of federalism were violated.

ARGUMENT

I. THE DISTRICT COURT'S REDISTRICTING ORDER WHICH WAS PRODUCED BY A PRIVILEGED MEDIATION PROCESS IS AN INVALID EXERCISE OF REMEDIAL POWER WHICH CIRCUMVENTED THE FLORIDA LEGISLATURE AND FLORIDA SUPREME COURT IN VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS AND FEDERALISM.

In *Miller v. Johnson*, 515 U.S. ____, 115 S.Ct. 2475 (1995), this Court emphasized that "the judiciary retains a independent obligation in adjudicating consequent equal protection challenges to ensure that the States' actions are narrowly tailored to achieve a compelling interest." 115 S. Ct. at 2491. In holding that it was inappropriate for a court engaged in "constitutional scrutiny" to accord deference to the Justice Department's interpretation of the voting rights act this Court reiterated that "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60 (1803).

This underscores the obligation of a federal court to undertake independent adjudication and to avoid surrendering this critical function to another branch of government.

This Court's many voting rights cases have explicated the proper role of the federal court's in such cases. Voting rights cases present special problems because of the interplay between the role of the federal executive department, the states, and the federal courts.

This Court has "repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, _____, 98 S. Ct. 2493, 2497 (1978). In *Wise*, this Court stated as follows:

> When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopted a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the constitution. *Wise, supra*, at 2497.

In *Wise*, this Court stated that legislative bodies should not leave their apportionment task to the federal courts but when they do not respond or the imminence of state elections makes it impractical to do so it becomes the "unwelcome obligation" of the federal court to "devise and impose a reapportionment plan pending later legislative action." *Wise*, 98 S. Ct. at 2497.

In *Growe v. Emison*, 507 U.S. 25, 113 S. Ct. 1075 (1993) this Court stated as follows:

> Today we renew out adherence to the principles expressed in *Germano*, which derive from the recognition that the Constitution leaves with the States primary responsibility for apportionment of their federal constitutional and state legislative districts. See U.S. Const., Art. I, Section 2. 'We

> say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the state through its legislature or other body, rather than of a federal court.' *Chapman v. Meier*, 420 U.S. 1, 27, 95 S. Ct. 751, 766 (1975). Absent evidence that these state branches will fail timely to perform that duty a federal court must neither affirmatively obstruct state apportionment nor permit federal litigation to be used to impede it. *Growe*, 113 S. Ct. at 1081.

In *Growe* this Court held that District Court's injunction of state court proceedings was clear error and was based on the mistaken view that federal judges need only defer to the Minnesota legislature and not all of the state's courts. This Court held that the deadline imposed by the District Court was for the legislature and ignored the possibility and legitimacy of state judicial redistricting. This Court held that the "doctrine of *Germano* prefers both state branches to federal court as agents of apportionment." 113 S.Ct. at 1081.

It is well established that in voting rights cases a federal court's equitable remedial power is not triggered unless there has been an adjudication that the apportionment in place is unconstitutional. Even then, the equitable power of the federal court is restrained. In *Reynolds v. Sims*, 377 U.S. 533, 585-586 (1964) this Court held that when a federal court has invalidated a state's apportionment plan, the court should "act with proper judicial restraint." In *Bush v. Vera*, 517 U.S. ____, 116 S.Ct. 1941(1996), this Court reiterated its "long-standing recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan." 116 S. Ct. at 1960, citing *Voinovich v. Quilter*, 507 U.S. 146, 156, 122 S. Ct. 1149, 1156 (1993) ("[I]t is the domain of the States and not the federal courts, to conduct apportionment in the first place."); *Miller, supra*, 115 S. Ct. at 2488 (It is well settled that reapportionment is primarily the duty and responsibility of the state.") *Bush, supra*, 116 S. Ct. at 1961.

In *Bush* this Court stated that "the States have traditionally guarded their sovereign districting prerogatives jealously, and we are confident they can fulfill that requirement, leaving the courts to their customary and appropriate backstop role." *Bush, supra*, 116 S. Ct. at 1964. This underscores the dictates of this Court that in such matters a federal court must minimize its friction between its remedies and legitimate state policies. *Connor v. Finch*, 431 U.S. 407, 414 (1977).

In *Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858 (1971), this Court stated that the "remedial powers of an equity court must be adequate to the task, but they are not unlimited. Here, the District Court erred in so broadly brushing aside state apportionment policy without solid constitutional or equitable grounds for doing so." 91 S. Ct. at 1878.

This Court again applied this principle in *Missouri v. Jenkins*, 495 U.S. 33, 110 S. Ct. 1651 (1990), where the Court held that a federal court's order imposing an increase in property taxes levied by a school district violated "principles of federal/state comity." This Court stated that it agreed that the District Court's order "contravened the principles of comity that must govern the exercise of the district court's equitable discretion in this area." 110 S. Ct. at 1663. This Court stated as follows:

> In assuming for itself the fundamental and delicate power of taxation the district court not only intruded on local authority but circumvented it all together. *Id.*

In so ruling, this Court reiterated that one of the most important considerations governing the exercise of equitable power is "a proper respect for the integrity and function of local government institutions." 110 S. Ct. at 1663.

In *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408 (1992) this Court held that a federal statute which required the state of New York to accept ownership of waste according to the instructions of Congress violated the Tenth Amendment. Despite the fact

that the state officials had consented to its enactment, had participated and reaped much benefit from the statute. This Court stated as follows:

> The Constitution does not protect the sovereignty of states for the benefit of the states or state governments as abstract political entities, or even for the benefit for the public officials governing the states. To the contrary, the Constitution divides authority between federal and state governments for the *protection of individuals*. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U.S. 722, 759, 111 S. Ct. 2546, 2570 (1991) (Blackmun, J. dissenting) "Just as the separation and independence of the coordinate branches of federal government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the states and the federal government will reduce the risk of tyranny and abuse from either front." (Citation omitted) *New York, supra*, 112 S. Ct. at 2431. (Emphasis added).

Based on these principles, this Court in *New York* held that the Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." *New York, supra*, 112 S.Ct. at 2431. This Court stated that the "constitutional authority of congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the executive branch *or the states*." *New York, supra*, 112 S.Ct. at 2432. (Emphasis added)

Although the *New York* case involved a state bringing an action challenging the federal statute, the clear implication of this Court's decision in *New York* is that the principle of federalism is for the protection of individuals. Individuals suffer abuse which results from the accumulation of excessive power in the federal government

including a federal court which exercises its equitable power completely unchecked. It follows that when a federal court, in the course of a judicial proceeding, violates principles of federalism then an individual litigant is entitled to redress a federal court's exercise of unbridled equitable remedial power in violation of the principles of federalism. A federal court is itself bound to uphold the Constitution. 28 U.S.C. § 453. In the process of adjudicating a voting rights case a federal court cannot eviscerate the individual rights of a litigant to the liberties derived from the diffusion of sovereign power and the right to representative state government. Any federal court order which violates these principles is invalid.

Although this Court has not been presented to date with this precise issue, the instant case places this issue squarely before the Court. The District Court stated that because Plaintiff Lawyer objected to Play 386 (as well as the present District 21), the final order is not a typical, plenary dissent decree that disposes of all aspects of liability and remedy by consent. Rather it is in the nature of a hybrid consent decree that disposes of liability by consent and affords a remedy resulting from a partial settlement and an advisory hearing similar to a fairness hearing." (J.A. at 207, n. 4)

The Court stated that "this order emanates from the proceedings November 20 at which the parties asked this Court to authorize a restatement of the boundaries of District 21." (J.A. at 198) The District Court cited the case of *United States v. City of Miami*, 664 F. 2d 435 (5th Cir. 1981) (*en banc*), as authority for this type of consent decree. However, in the *City of Miami* case, the Fifth Circuit of Appeals held that a decree which provides a remedy agreed to by some, but not all, of the parties cannot effect the rights of a dissenting party. In the instant case, the Appellant did not consent to the decree. However, the decree represented a disposal of all claims raised by Appellant in his lawsuit by virtue of the approval of the consent decree. District 21 was replaced by Plan 386.

Chief Judge Tjoflat understood this problem when he stated that "the judgment the court enters today is not a consent judgment." Citing *White v. Alabama*, 74 F.3d 1058, 1073-74 (11th Cir. 1996), Chief Judge Tjoflat stated that "to enter the judgment in question, the

court must find that District 21 is unconstitutional." (J.A. at 209) Instead, Chief Judge Tjoflat stated that "the evidence in this case has been closed. It is as if we had held a bench trial and taken the case under submission." (J.A. at 209) However, there had been no bench trial. Obviously, any adjudication in the absence of a bench trial would violate Appellant Lawyer's right to due process and Middle District of Florida Local Rule 9.07(a) which requires a trial where mediation ends in an impasse. App. B to Brief in Opposition to Motions to Affirm.

At no time did the defendants admit liability and the District Court did not adjudicate liability. Therefore, the final order entered by the District Court constitutes the invalid exercise of federal equitable power in the form of a redistricting, in the absence of consent of Appellant Lawyer, or an adjudication of the unconstitutionality of the previous district. Several decisions of the lower clearly suggest that the District Court had a mistaken impression of the applicable legal principles.

In *League of United Latin American Citizens Counsel No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*) *cert. den.* 114 S. Ct. 878 (1994) the Fifth Circuit refused to remand the case to the District Court to consider the entry of a consent decree in an action challenging the single district system of election trial judges in Texas where the proposed consent decree did not respond to sufficiently identify illegality. 999 F.2d at 847. After these attempts to reform judicial elections in the state legislature failed state officials and lawmakers proposed to achieve the same result through a settlement form of a federal consent decree. The proposed decree provided for the continuance of at-large elections with the exception that two intervenor-state judges who objected to the settlement would be elected in a county-wide election. The stated purpose was to deny the intervenor-district judges' standing to object. 999 F.2d at 839.

The Fifth Circuit stated that "even if all of the litigants were in accord, it does not follow that the federal court must do their bidding." 999 F.2d at 845. The court emphasized that the proposal was not to dismiss the lawsuit but to "employ the injunctive power of the federal court to achieve the result that the Attorney General

and plaintiff were not able to achieve through the political process." 999 F.2d at 845. The court emphasized that the entry of a consent decree is a judicial act in which a court makes an adjudication. The court noted that "courts must exercise equitable discretion before accepting litigants' invitation to perform the judicial act." 999 F.2d at 845 citing *United States v. Swift & Co.*, 286 U.S. 106, 115, 52 S. Ct. 460, 462 (1932). The court cited this court's decision in *Local #93, Int'l. Ass'n. Of Firefighters v. City of Cleveland*, 478 U.S. 501, 529, 106 S.Ct. 3063, 3079 (1986), for the proposition that a consent decree cannot dispose of the valid claims of non-consenting intervenors; if properly raised these claims remain and may be litigated by the intervenor."

The court also stated that "consent is not enough when litigants seek to grant themselves powers they do not hold outside of court." 999 F.2d at 846. The court noted the "danger of manipulation faced by federal courts when they are "asked to effectuate substantive results that government officials are not empowered to bring about themselves." 999 F.2d at 846.

Citing *Shaw v. Reno (Shaw I)*, 509 U.S. _____, 113 S. Ct. 2816 (1993) the Fifth Circuit stated that "any federal decree must be a tailored remedial response to illegality." The Fifth Circuit refused to remand the case to consider entry of a consent decree where the proposed consent decree did not respond to a sufficiently identified illegality. 999 F.2d at 847.

Addressing the issue of federalism, the Court stated as follows:

> The suggestion that state political groups, unable to muster sufficient political force to change the system, can by 'agreement' enlist the preemptive power of the federal court to achieve the same end stands federalism on its head. Of course, we defer to legislative will and state decision. Here, the 'decision' to which we are asked to defer is a decision by a political faction that the federal court should order the state to change its system. We do not share this curious view of federalism. 999 F.2d at 849.

Other lower courts have consistently refused to exercise federal remedial power in the manner exercised in the instant case. For example, in *Perkins v. City of Chicago Heights*, 47 F.3d 212 (7th Cir. 1995) the plaintiffs in a class action appealed a consent decree entered in a voting rights case. The parties had moved for summary judgment, and a magistrate had suggested that the district court grant summary judgment for the class. The district judge adopted the magistrate's findings and entered summary judgment for the class but did not enter a finding of liability against the defendants. Instead, the case was submitted to mediation and the parties agreed to a consent decree which included a new voting map consisting of single-member districts and a revised form of government for the city and park district. Two of the named plaintiffs filed a motion objecting to their being disregarded as named plaintiffs during settlement negotiations. 47 F.3d at 215.

After a public hearing the district judge approved the parties' consent agreement and entered finding of fact, conclusions of law and a judgment which changed the city's form of government.

The Seventh Circuit Court of Appeals vacated the consent decree and stated that "while parties can settle their litigation with consent decrees, they 'cannot agree to disregard valid state laws' and ... cannot consent to do something together they lack the power to do individually." 47 F.3d at 216. The Seventh Circuit stated as follow:

> We have previously recognized that "[s]ome rules of law are designed to limit the authority of public office holders, to make them return to other branches of government or to the voters for permission to engage in certain acts. They may chafe at these restraints and seek to evade them"...but they may not do so by agreeing to do something state law forbids. 47 F.3d at 216.

The Seventh Circuit went on to state that although that when a court has found a federal constitutional or statutory violation a state law cannot prevent a necessary remedy and upon properly supported findings, where such a remedy is necessary to rectify a violation of federal law, the district court can approve a consent degree which overrides state law provisions. 47 F.3d at 216. However, the court noted, without such findings, "parties can only agree to that which they have the power to do outside of litigation." *Id.*

The court cited its previous decision in *Kasper v. Bd. Of Election Com'rs of City of Chicago*, 814 F.2d 332, 342 (7th Cir. 1987), for the proposition "and [a]n alteration of the statutory scheme may not based on consent alone; it depends on an exercise of federal power, which in turns depends on a violation of federal law." 47 F. 3d at 216. In language directly applicable to the instant case, the court cited another one of its decisions, *Ragsdale v. Turnock*, 941 F.2d 501, 515 (7th Cir. 1991), as follows:

> [T]he appropriate relation between state and national power... is one in which federal judges employ their equitable powers to enjoin the enforcement of state statutes only after they have determined that these statutes contain some constitutional deficiency. (Flaum, J., concurring in part and dissenting in part) *cert. den.* 502 U.S. 1035, 112 S.Ct. 879 (1992).

The *Perkins* court held that the proposed consent decree provided that it should not be construed as an admission liability by the city. The court held that these generalized statements did not constitute sufficient findings of a violation of federal law and could not adequately form the basis for modifications of the Illinois statutory forms of government. Therefore, the Seventh Circuit vacated the decree. 47 F.3d at 217.

In *Brooks v. State Board of Elections*, 848 F. Supp. 1548 (S. D. Ga. 1994), remanded and appeal dismissed as moot, 59 F.3d 1114 (11th Cir. 1995) the Court rejected the proposed consent decree in a

voting rights case where there was no admission of liability and no trial. The Court held that the proposed consent decree had not been approved by the state legislature and the people and, therefore, proponents lacked authority to settle the case. The decree would have violated the Georgia Constitution regarding the election of judges as well as several fundamental Georgia statutes. 848 F. Supp. at 1553, 1554, 1564.

The court also held that the consent decree violated Georgia law by "impermissibly decreasing the power of the electorate" because the decree "would remove the right of the electorate to choose directed via contested elections who would represent them in a particular judicial post." 848 F. Supp. at 1567.

Ultimately, the District Court rejected the consent decree because there had been no determination to date that the current Georgia judicial election system violated the voting rights act or the federal constitution. The court stated as follows:

> Absent such a finding it would be wholly inappropriate, and indeed an abuse of this court's power, to force a change upon Georgia's citizens, particularly a change that would clearly reduce their rights to select public officials of their choice through the mechanism they developed and ratified in their constitution. Under these circumstances, the court must defer to the system enacted by the people of this state...a retention election system, such as the one set force in the consent decree, cannot satisfy the present George constitutional requirement that judges be elected....In these and other ways the consent decree would, could the coercive and injunctive powers of this court as opposed to the normal legislative and political processes, effectively amend the 1983 Georgia constitution and nullify present Georgia statutory law. The court cannot its power to be used in that fashion in these circumstances. 848 F. Supp. at 1577.

In the instant case, without any adjudication that then-current District 21 was unconstitutional or that Article III, Section 16 of the Florida Constitution which provided the mechanism for apportionment was unconstitutional, the District Court judicially commandeered the apportionment task and became the "agent of apportionment." The Final Order removed then-current District 21 and approved Plan 386 in one fell swoop without any pleadings or trial directed at Plan 386.

The District Court accomplished this by submitting the case to mediation where the lawyers for the branches of government acted as a surrogate state government. Armed with a state bureaucrat, the lawyers ultimately arrived at a settlement agreement in the form of Plan 386 which was never properly before the District Court because it had not been produced in accordance with the Florida Constitution. However, although the attorneys for the Florida House and Senate may have had authority to *litigate* on behalf of those bodies, they did not have the authority to *legislate* by proxy. Therefore, not only did the settlement agreement not have the consent of Appellant Lawyer who was a party plaintiff but the settlement agreement did not have the effective consent of the Florida Senate or the Florida House of Representatives.

Moreover, even if the Attorney General, the Florida Senate and the Florida House of Representatives had been able to effectively consent to the settlement agreement, the District Court could not have used its equitable power to override the organic law of the State of Florida as contained in Article III, Section 16 of the Florida Constitution which provides the procedure by which apportionment is to be accomplished. Specifically, that procedure calls for an enactment of legislation, or in the absence thereof, a judicial reapportionment by the Florida Supreme Court. Art. III, § 16(f), Fla. Const.

Thus, the settlement agreement accomplished what the parties to the litigation could not have accomplished outside of the litigation. That is, the creation of an apportionment law in total disregard of Article III, § 16 of the Florida Constitution. Even assuming that the settlement agreement was construed as legislative

action, the District Court's order pre-empted the role of the Florida Supreme Court.

The Final Order of the District Court, then, represented an exercise of unlimited federal equitable power in total disregard of Florida's state institutions which were circumvented by the District Court through its court-ordered mediation process. Thus, the Final Order constitutes an exercise in legislative power. The power of judging was joined with the power of legislating in violation of the doctrine of the separation of powers. The Federalist, No. 47 ("were the power of judging joined with the legislative, *the life and liberty of the subject* would be exposed to arbitrary control, and the judge would then be the legislator.") (emphasis added)

This egregious usurpation of the authority the institutions of the State of Florida was compounded by the nature of the mediation process. Because the District Court recognized the lawyers for the Florida Senate and House of Representatives as having authority to consent to the substitute redistricting legislation, the lawyers were then free to engage in mediation as if this were garden variety litigation which is commonly settled via mediation. In particular, mediation is confidential in the Middle District of Florida and no part of the deliberations can be made public. Therefore, what would ordinarily be a legislative process characterized by debate and voting and, ultimately, a law signed by Governor of the State of Florida and review by the Florida Supreme Court became a mediation conducted by attorneys and a mediator in closed-door caucuses. Therefore, this usurpation of the state legislative process was compounded by the violation of the Florida Sunshine Act which requires that all legislation be conducted in public. Chapter 286, Florida Statutes.

Senator Howard Forman's abhorrence of such a process was expressed in his letter dated September 21, 1995 to Chief Judge Tjoflat. App. A to Brief Opposing Motior *s* to Affirm.

The confidential nature of the mediation process is of particularly direct importance in this case because even if it were possible for the President of the Senate and the Speaker of the House of Representatives to effectively delegate the legislative function to

their attorneys to be exercised in a mediation process, the requirements of this court in *Miller v. Johnson*, *supra,* would still not be satisfied. This court in *Miller* specifically stated that direct evidence of motivation is derived from the legislative process which normally attends the enactment of apportionment legislation. The entire premise of the *Miller* case is that apportionment legislation is the product of a legislative process conducted by the state legislature. Therefore, the procedure adopted by the District Court short-circuited the legislative process so as to preclude the creation of evidence of legislative intent and is fatally flawed under *Miller*.

Furthermore, the mediation process also categorically precluded any evidence of any compelling state interest for the redistricting because a compelling state interest can only be manifested by the state institution which in the case of apportionment is the state legislature or the Florida Supreme Court.

Therefore, this court should reverse the final order of the District Court. The order constitutes an invalid consent decree which accomplishes a redistricting without adjudication, without consent, and in circumvention of the Florida Legislature and Supreme Court in violation of the principles of federalism and separation of powers embodied in the Tenth Amendment to the Constitution.

II. REDISTRICTING SETTLEMENT PLAN 386 OF FLORIDA SENATE DISTRICT 21 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION BY DELIBERATELY CLASSIFYING VOTERS ON THE BASIS OF RACE AS A RESULT OF THE DISTRICT COURT'S FAILURE TO APPLY THE PROPER LEGAL STANDARDS REQUIRED BY *MILLER v. JOHNSON* AND BY FAILING TO COMPLY WITH THE REQUIREMENTS OF STRICT SCRUTINY.

Irrespective of whether this court rules on the issues raised in Question I, the District Court failed to properly apply the legal standards set forth in *Miller* in approving Plan 386. Plan 386 violates

the Equal Protection Clause of the Fourteenth Amendment because it deliberately classifies voters on the basis of race.

Appellant contends that Senate District 21 was not race-neutral and that the driving force behind its creation was to effectuate the perceived common interests of one racial group--African-Americans. The District Court did not adjudicate the constitutionality of District 21. Although the District Court stated that "a cognizable, constitutional objection to the proposed District 21 is not established" (J.A. at 205), the District Court did not conduct an independent judicial analysis of Plan 386. The District Court cited this Court's decision in *Miller,* but failed to properly apply its principles to Plan 386 and ultimately, adopted Plan 386 because it was the choice of the legislature. This is clear from the final order where the District Court repeatedly stated that the final order was in "sincere deference to legislative discretion." (J.A. at 206) The court also stated that "this court necessarily respects the will of the legislature as manifested in this instance by the consent of both the President of the Florida Senate and the Speaker of Florida's House of Representatives. (J.A. at 206) The court concluded that "the legislature's view, not this court's view, of the wisdom of Plan 386 controls (absent a constitutional infirmity). The legislature makes the pertinent choice and the legislature has chosen Plan 386." (J.A. at 207) Indeed, even the District Court acknowledged its "limited review" of Plan 386 (J.A. at 207)

Clearly, the District Court failed to properly apply the *Miller* principles in determining whether Plan 386 had a constitutional infirmity and an application of those principles to Plan 386 indicates that Plan 386 violates the Equal Protection Clause of the United States Constitution.

In *Miller v. Johnson*, *supra,* this Court outlined the correct analysis of proof upon the issue of whether a legislative district is racially gerrymandered as follows:

> The Plaintiff's burden is to show, either through circumstantial evidence of a District's shape and demographics or more direct evidence going to

> legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a Plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests to racial considerations. Where these or other race-neutral considerations are the basis for redistricting litigation, and are not subordinated to race a state can 'defeat a claim that a district has been gerrymandered on racial on racial lines. *Miller, supra,* 115 S.Ct. at 2488.

This Court held that the District Court in *Miller* applied the correct analysis and that its finding that race was the predominant factor motivating the drawing of the Eleventh District was clearly erroneous. This Court recited that the *Miller* District Court found that:

> It was "exceedingly obvious" from the shape of the Eleventh District, together with the relevant racial demographics, that the *drawing of narrow land bridges* to incorporate within the District outlying appendages containing nearly 80% of the district's total black population was a deliberate attempt to bring black populations into the district. 864 F.Supp. at 1375; see *id.*, at 1374-1376. Although by comparison with other districts the geometric shape may not seem bizarre on its face, *when its shape is considered in conjunction with its racial and population densities*, the story of racial gerrymandering seen by the District Court becomes much clearer. *Miller, supra,* 115 S.Ct. at 2489. (emphasis added)

Without determining whether the shape of the district in conjunction with its racial and population densities was, standing alone, sufficient to establish a Shaw claim that the district was

alone, sufficient to establish a *Shaw* claim that the district was unexplainable other than race, this Court noted that the District Court had before it "considerable additional evidence showing that the general assembly was motivated by a predominant, overriding desire to assign black populations to the Eleventh District and thereby permit the creation of a third majority-black district in the second. 115 S.Ct. at 2989.

This Court in *Miller* cited the fact that the United States Justice Department had demanded that the state legislature comply with the Department's demand for a majority black district. The state admitted that it would not have added portions of counties in the Eleventh District but for the Department of Justice's objection. The District Court in *Miller* found that the general assembly had "acquiesced" and as a consequence was "driven by its overriding desire to comply with the Department's maximization demands." 115 S.Ct. at 2489.

This Court stated that although a legislature's compliance with "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" may well suffice to refute a claim of racial gerrymandering "appellants cannot make such refutation where, here, those factors were subordinated to racial objectives." 115 S.Ct. at 2489. This Court emphasized that a State's districting legislation cannot be rescued by "a mere recitation of purported communities of interest." 115 S.Ct. at 2490. This Court stated that this was compelling "that there are no tangible single 'communities of interest' spanning the hundreds of miles of the Eleventh District." 115 S.Ct. at 2490.

The Court held that race was the "overriding factor explaining the general assembly's decision to attach to the Eleventh District various appendages containing dense majority-black populations." Thus, the plan could not be upheld unless it satisfied strict scrutiny. 115 S.Ct. at 2490.

Subsequent to this Court's decision in *Miller*, this Court rendered decisions in two redistricting cases which applied this analysis to redistricting plans. Specifically, in *Shaw v. Hunt (Shaw*

II), 517 U.S. ____, 116 S.Ct. 1894, 1901 (1996) this Court approved the District Court's finding District Twelve in North Carolina was highly irregular and geographically non-compact by any objective standard that can be conceived." 116 S.Ct. at 1901. This Court also stated the District Court had direct evidence that the overriding purpose of the state legislature was to "comply with the dictates of the Attorney General's December 18, 1991 letter and to create two Congressional Districts with effective black voting majorities." 116 S.Ct. at 1901. This Court in *Shaw II* stated that in creating District Twelve "race was the criterion that, in the state's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play after the race-based decision had been made." 116 S.Ct. at 1901.

In *Bush v. Vera*, 517 U.S. ____, 116 S.Ct. 1941 (1996) the decision to create the districts in question as majority-minority districts was made at the outset of the process and never seriously questioned." 116 S.Ct. at 1953. The districters utilized a computer to manipulate district lines on which racial and other socio-economic data were superimposed. 116 S.Ct. at 1953. This Court stated that the state substantially neglected traditional districting criteria. The Court stated that, however, for strict scrutiny to apply, such traditional districting must be subordinated to race. 116 S.Ct. at 1953.

In the *Bush* case, the state did not deny that the district showed substantial disregard for traditional districting principles or that the redistricters had pursued the objective of creating a majority African-American district. However, the state argued that the bizarre shape of the district was explained by efforts to unite communities of interest in a single district and to protect incumbents. 116 S.Ct. at 1955. This Court concluded that the District Court had ample bases on which to conclude both that racially-motivated gerrymandering had a qualitatively greater influence on the drawing on the district lines than politically motivated gerrymandering and that political gerrymandering accomplished in large part by the use of race as a proxy. 116 S. Ct. at 1956. Specifically, the District Court noted that incumbency protection had been achieved by using race as a proxy. 116 S.Ct. at 1957.

However this Court ruled that "most significantly, the objective evidence provided by the district plans and demographic maps suggest strongly the predominance of race." 116 S.Ct. at 1957. The Court stated that "maps reveal that political considerations were subordinated to racial classification and the drawing of many of the most extreme and bizarre lines." 116 S.Ct. at 1957. This Court stated as follows:

> District 30, for example, reaches out to grab small and apparently isolated minority communities which, based on the evidence presented, could not possibly form part of a compact majority-minority district, and does so in order to make up for minority populations closer to its core that it shed in a further suspect use of race as a proxy to further neighboring incumbents' interests. 116 S.Ct. at 1961.

Ultimately, this Court in *Bush* held that strict scrutiny applied and it must be determined whether the racial classifications embodied in the districts were "narrowly tailored to further a compelling state interest." 116 S.Ct. at 1960.

It is clear that the Settlement Plan does not pass constitutional muster under the Equal Protection Clause as interpreted by this Court *Miller, Bush v. Vera,* and *Shaw II supra*. An analysis reveals that the plan is still unconstitutional for the same reasons as its predecessor. Appellant raised the objections set forth below to Plan 386 in his Motion To Disapprove November 2, 1995 Settlement Agreement.

As this Court made very clear in *Shaw II*, it is not enough for a State to "respect' or "comply with" traditional districting principles such as compactness, contiguity, and respect for political subdivisions. 116 S.Ct. at 1901 (text and n.3). A State cannot refute a claim of racial gerrymandering where "those factors *were subordinated to racial objectives*. *Id.* (n.3, emphasis in original).

The following is a summary of Appellant Lawyer's Motion to Disapprove November 2, 1995 "Settlement Agreement" which was filed on November 13, 1995. (R. 178); J.S., App. C at 21a.

A. Shape

First, the shape of Settlement Plan 386 is bizarre on its face as is evident from the map. It trolls across Tampa Bay in order to incorporate within the new district outlying appendages of Pinellas and Manatee counties containing enclaves of black population in those counties in order to bring them into the district. Appendix C to this Brief at 4a was contained in J. S. App. E at 30a and is the map filed with the District Court by the State Defendants. (R. 187)

Appendix D at 5a to this Brief was contained in J. S. App. F at 31a. It is an enhancement of Appendix C to this Brief. Although Appendix C depicted the shoreline, the color coding of the map does not depict the water of Tampa Bay. Appendix D to this Brief as enhanced, was not part of the record below. It is included here in order to accurately depict the waters of Tampa Bay and the Big Manatee River in the color blue. It also depicts the fact that Plan 386 includes unpopulated areas of water. This Court should take judicial notice of this enhanced map of Plan 386.

As this Court stated in *Shaw II*, at 116 S.Ct. 1906, with respect to North Carolina Congressional District 12, no one looking at the Settlement Plan herein (J. S. App. E, Appendix D to this Brief) could reasonably suggest that the district contains a "geographically compact" population of any race, especially when it is compared to surrounding districts.

Similar to Texas Congressional District 30 (Dallas) struck down by this Court in the companion case of *Bush v. Vera*, the district "reaches out to grab small apparently isolated communities which...could not possibly form part of a *compact* majority-minority district and does so in order to make up for minority populations closer to its core that it shed in a further suspect use of race..." 116 S.Ct. At 1961 (emphasis added). The northeast Tampa part of the Settlement Plan district may be compact; but, like Dallas C.D. 30, the

"remainder of the district consists of narrow and bizarrely shaped tentacles." *Id.* at 116 S.Ct. 1954.

Unquestionably, by even the most casual observance, the shape of Settlement Plan Senate District 21 (Plan 386), when viewed showing the waters of Tampa Bay and the Big Manatee River, are highly "irregular" when compared to "regular" shapes such as a square of circle.

B. Respect for Political Subdivisions

In ignoring the contention that the three counties involved were carved up to maximize the Black voting population, the District Court failed to give legal effect to the gross statistical data which would have compelled the conclusion that Plan 386 was unconstitutional.[3] Instead, in the face of these statistics, the District court merely concluded that "Plan 386 reduces the percentage of minority constituents and more closely approximates the racial features of the larger geographic region surrounding Tampa Bay. (J.A. at 207)

The fact remains that the shape of Plan 386 and the statistics demonstrate that the shape of the district was dictated by a desire to reach out from Hillsborough County to enclaves of Black voters in other counties to include them in the new district. This is precisely the type of racial gerrymandering this Court disapproved in *Miller*.

Appellant Lawyer pointed out in his memorandum that, although the actual percentage of Black voting age population

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[3] The Settlement Plan also disregards the municipal boundaries of Tampa in the Northeast lump of the district and St. Petersburg in the northwest lump of the district (north of the Skyway Bridge). This "utter disregard of city limits" was condemned by the plurality opinion in *Bush v. Vera, supra* at 116 S.Ct. 1959.

(V.A.P.) for the three counties in question was only 8% (R-No. 178, Exhibit #1, Table 1), the settlement Plan contained a Black percentage of V.A.P. of 36.2% (*Id.* at Table 2).

Secondly, as Appellant Lawyer pointed out, the settlement Plan increased the Black percentage of V.A.P. in Hillsborough County from 10.9% to 30.5%. (*Id.* at Tables 1 and 2) For Manatee County, the percentage was increased from 5.9% to 32%; and for Pinellas County, the percentage was increased from 6.1% to 58.5%, an increase of 959%. (*Id.*)

Third, Appellant Lawyer noted that Table No. 3 of Exhibit # 1 (R-No.178) indicates that in order to obtain high percentages of Black persons within the Settlement Plan district, the architects of the plan included well over half of the Black voting age residents in Pinellas and Manatee counties. (*Id., citing* Table 3) Thus, Table 3 indicates that the Settlement Plan includes 64.4% of Pinellas County's Black V.A.P. and 74.8% of Manatee County's Black V.A.P. *Id.*[4]

Another way of looking at the population statistics emphasizes why the crafters of the Settlement Plan chose to cross over county lines. The ideal population for a Florida Senate District is 323,488. (R-No. 178, Exhibit # 3) If a district were restricted to Hillsborough County and somehow managed to include *all* of Hillsborough County's 68,864 voting-age Black persons in such a district, the Black V.A.P. would be only 21.29% (68,864 ÷ 323,448).

The district court totally ignored this glaring statistical proof that race was the motivation for the bizarre shape of Settlement Plan 386.

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[4] The extraction of these African-American voters, particularly the nearly 75% of Manatee County's African Americans, is similar to the type of action condemned in *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960), in the context of a violation of the Fifteenth Amendment of the United States Constitution. Therein, 99% of a city's African-American population were excluded from the re-drawn city boundaries.

C. Contiguity

Lawyer further pointed out that the Settlement Plan violated the principle of contiguity because it reached over the unpopulated area of Tampa Bay in order to include Pinellas County within the district. (R. 178 at 4) It is one thing for a plan to include islands which need to be placed in some district. It is another thing entirely to carve out enclaves from a land mass which is part of a peninsula. The Florida Supreme Court made it clear that it only traversed Tampa Bay at the insistence of the Justice Department. *In re Constitutionality of SJR 2G*, 601 So.2 543, 545 (1992) Plan 386 left intact this prominent feature which was implemented in acquiescence to the demands of the Justice Department.

D. Compactness

In addition, Appellant Lawyer stated that the inclusion of the portions of Manatee and Pinellas Counties violated the race-neutral principle of compactness inasmuch as compactness could have been achieved by expanding the area around the core of Hillsborough County within the district. *Id.* As racial-gerrymandering jurisprudence has developed, we see that shape and compactness are closely-related factors, and that compactness may be viewed "quantitatively". *Bush, supra* at 116 S.Ct. 1952, 1958-1959; Pildes & Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights; Evaluating Election-District Appearances after* Shaw v. Reno, 92 Mich. L. Rev. 483.

The law review article, cited with approval by the plurality opinion in *Bush*, asserts two objective measures of compactness: dispersion and perimeter. Pildes & Niemi at 536-599. By either measure, Settlement Plan Senate District 21 is unacceptably non-compact.

Both measures use a circle as the point of reference. "Dispersion" measures "the ratio of the district area to the area of the minimum circumscribing circle." Pildes & Niemi at 554. For the Settlement Plan district, the center of the district is approximately at the "21" on the map (Appendix D to this Brief) and the radius would

then extend to the district's outer edges. Even disregarding the water portions, one can readily visualize that the area encompassed in District 21's circle includes a much larger area not in the district; and it *completely engulfs* two other districts (S-20 and S-22).

"Perimeter" is the ratio of the district area to the area of a circle with the same perimeter. Pildes & Niemi at 555. Convoluted district borders substantially lengthen the boundary without enclosing more area and, hence, score low. *Id.* at 556. Although this measure (4πArea ÷ Perimeter^2) has not been mathematically applied to the Settlement Plan district, one can readily assume an extremely low score given District 21's convoluted borders, even using the water-disregarded borders of the proponents' map at App. C.

In evaluating the lack of compactness in terms of racial gerrymandering in Florida, it is important to note that Pildes & Niemi's quantitative measurement of U.S. Congressional Districts found four of Florida's Congressional Districts to be among the country's worst eight in terms of dispersion and perimeter. *Id.* at 565 (Table # 3), 566. Further, Florida's Congressional Districts became *less* compact in the 1990s redistricting, compared to the 1980s redistricting. *Id.* at 571 (Table 6), 574. The authors attribute this lessening of compactness in substantial part to minority enhancing policy (*id.* at 574-575); and it was this Florida redistricting mind-set which produced the precursor to the Settlement Plan district and which quite arguably led the mediating parties, other than appellant, to formulate the Settlement Plan district.

It is not surprising that both the State Appellees and the Justice Department candidly acknowledge Florida's lack of respect for compactness in their respective motions to affirm. Dept. Justice, Mot. To Aff. at 5 ("compactness is not a criteria for drawing districts that Florida has regularly followed in the past 20 years..."); State App., Mot. To Aff. At 12 ("The shape of the [Settlement Plan] district is not peculiar relative to other legislative districts....'). Appellees cannot be allowed to use Florida's acknowledged 20-year history of disrespect for compactness to justify the extreme disrespect for compactness evident in Settlement Plan 386.

E. Community of Interest

This Court stated, "nor can the State's districting...be rescued by mere recitation of purported communities of interest." *Miller, supra,* at 115.S.Ct. 2490. "Where the State assumes from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates." *Id.*

In the instant case, the proponents of Plan 386 included portions of Manatee and Pinellas counties within the district in order to further a black-maximization policy which assumed that Black voters in those counties had a communities of interest. This practice was harshly rebuked by this Court in *Miller, supra*, at 115 S. Ct. 2492-2493.

The only "evidence of " community of interest" came from the affidavit of state bureaucrat Guthrie who offered *post hac* race-neutral explanations which would apply to any district in the United States (*i.e.*, concern about AIDS and economic development). This was obviously pretextual and inadequate under *Miller*. The plurality opinion in *Bush* put it this way "[T]he State's supporting data...do not differentiate the district from surrounding areas." 116 S.Ct. 1995 (citation omitted).

Even the District Court herein did not rely on these self-serving declarations in support of its decision. Instead, the District Court submitted the Settlement Plan to a referendum at the "fairness hearing" and concluded that the absence of objections signaled that the residents of District 21 "regarded themselves" as a "community" and had given their "presumptive consent" to the plan. (J.A. at 204-206)

The District Court's conclusion that there was a community of interest because no one (other than Appellant Lawyer and a former State Senator) objected at the so-called fairness hearing to Settlement Plan 386 is without any analytical or constitutional basis.

Thus individually and collectively, the standards of analysis enunciated by this Court in *Miller, Bush v. Vera,* and *Shaw II, supra,* and equal protection are violated by settlement Plan 386.

As indicated in Point I, the District Court's submission of the case to mediation which was carried out by attorneys for the litigants in secret caucuses precluded the generation of any direct evidence regarding the motivation of the redistricters in the configuration of Plan 386. Indeed, at the "fairness hearing" Appellant Lawyer sought to elicit the testimony of the attorneys who were the proxies for the Florida House and Senate as well as the lawyers for the Department of Justice which had participated in the mediation sessions. However, the District Court declined to permit such examination of these attorneys and therefore the result was that the District Court's submission of the case to mediation itself precluded a proper application of a *Miller* analysis.

However, there is sufficient direct evidence that the driving force behind the configuration of Plan 386 was race. There is every reason to believe that the Department of Justice continued to assert its demand for a majority-minority Black district in the negotiations which led to the Settlement Plan 386. Therefore, the finding that Plan 386 is less unconstitutional than District 21 does not erase the fact that District 21 was the product of racial motivation by the Florida Supr[illegible] Court in acquiescence to the Department of Justice.

Less "recognizable" does not suffice to remove the original motivation for District 21 in the first place. Instead, it is clear that the original motivation of acquiescing to the Department of Justice's demands by creating a district that spanned Tampa Bay is perpetuated in and carried over in Plan 386 and therefore it must be assumed that the motivation of acquiescing to the Department of Justice's demand for a majority Black district spanning Tampa Bay remained a major force in the creation of Plan 386. It is clear that the Florida legislature would not have configured a district that crossed Tampa Bay but for the Justice Department's insistence that they do so.

Therefore, it is clear that race was the predominant overriding factor explaining the decision of the proponents of Plan 386 to attach portions of Pinellas and Manatee Counties to the district in order to maximize the Black voting population in the district. The Plan fails to comply with the traditional districting principles such as compactness, contiguity and respect for political subdivisions as well as communities of interest. Therefore, Plan 386 cannot not be upheld unless it satisfied strict scrutiny.

The District Court did not find there was any constitutional objection to Plan 386 and therefore erroneously did not find that strict scrutiny applied to the implementation of Plan 386. However, even if it had, only state legislation can ever be narrowly tailored to achieve a compelling state interest. Here there never was state legislation and therefore, there was no compelling state interest to justify the redistricting. Indeed, the District Court wholly failed to make any findings to explain or justify the redistricters' drawing of the boundaries and thus the District Court to act "circumspectly and in a manner 'free from any taint of arbitrariness or discrimination.'" *Connor v. Finch*, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834 (1977) quoting from *Roman v. Sincock*, 377 U.S. 695, 710, 84 S.Ct. 1449 (1964)

This Court in *Miller* emphasized that the " judiciary retains an independent obligation in adjudicating consequent equal protection challenges to insure that the state's actions are narrowed tailored to achieve a compelling interest." *Miller, supra*, 115 S.Ct. at 2491. The District Court in this case did not exercise its independent obligation to adjudicate the constitutionality of Plan 386 in this case.

CONCLUSION

This Court should reverse the Final Order of District Court which approved Settlement Plan 386, and remand to the District Court with instructions to declare Settlement Plan 386 unconstitutional, and to thereafter proceed accordingly.

Respectfully submitted,

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C. Martin Lawyer, III, *Appellant*
Member of the Bar of this Court

November 1996

Art. III, § 16, Fla. Const.

SECTION 16. Legislative Apportionment.—
(a) SENATORIAL AND REPRESENTATIVE DISTRICT. The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory. Should that session adjourn without adopting such joint resolution, the governor by proclamation shall reconvene the legislature within thirty days in special apportionment session which shall not exceed thirty consecutive days, during which no other business shall be transacted, and it shall be the mandatory duty of the legislature to adopt a joint resolution of apportionment..
(b) FAILURE OF LEGISLATURE TO APPORTION; JUDICIAL REAPPORTIONMENT. In the event a special apportionment session of the legislature finally adjourns without adopting a joint resolution of apportionment, the attorney general shall, within five days, petition the supreme court of the state to make such apportionment. No later than the sixtieth day after the filing of such petition, the supreme court shall file with the secretary of state an order making such apportionment.
(c) JUDICIAL REVIEW OF APPORTIONMENT. Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the

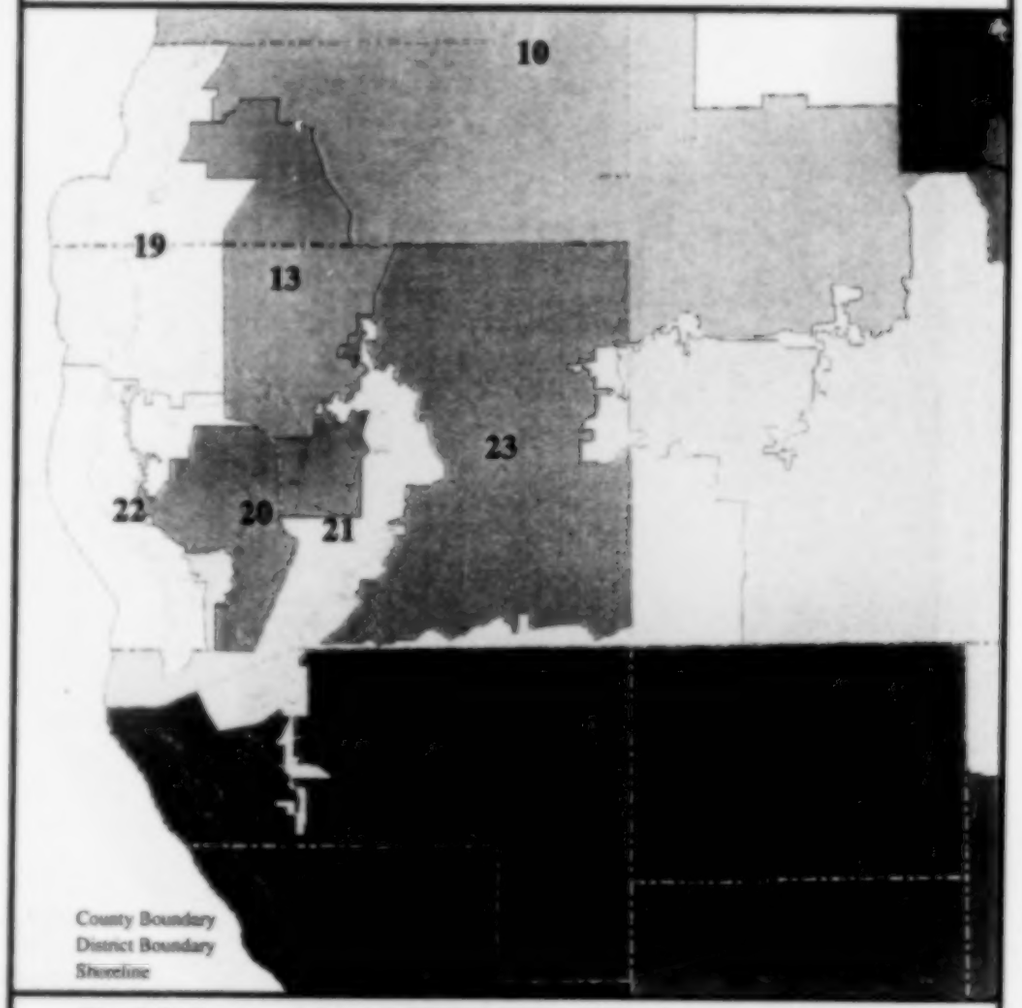
validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

(d) EFFECT OF JUDGMENT IN APPORTIONMENT; EXTRAORDINARY APPORTIONMENT SESSION. A judgment of the supreme court of the state determining the apportionment to be valid shall be binding upon all the citizens of the state. Should the supreme court determine that the apportionment made by the legislature is invalid, the governor by proclamation shall reconvene the legislature within five days thereafter in extraordinary apportionment session which shall not exceed fifteen days, during which the legislature shall adopt a joint resolution of apportionment conforming to the judgment of the supreme court.

(e) EXTRAORDINARY APPORTIONMENT SESSION; REVIEW OF APPORTIONMENT. Within fifteen days after the adjournment of an extraordinary apportionment session, the attorney general shall file a petition in the supreme court of the state setting forth the apportionment resolution adopted by the legislature, or if none has been adopted reporting that fact to the court. Consideration of the validity of a joint resolution of apportionment shall be had as provided for in cases of such joint resolution adopted at a regular or special apportionment session.

(f) JUDICIAL REAPPORTIONMENT. Should an extraordinary apportionment session fail to adopt a resolution of apportionment or should the supreme court determine that the apportionment made is invalid, the court shall, not later than sixty days after receiving the petition of the attorney general, file with the secretary of state an order making such apportionment.

1992 SENATE PLAN 330 TAMPA BAY AREA



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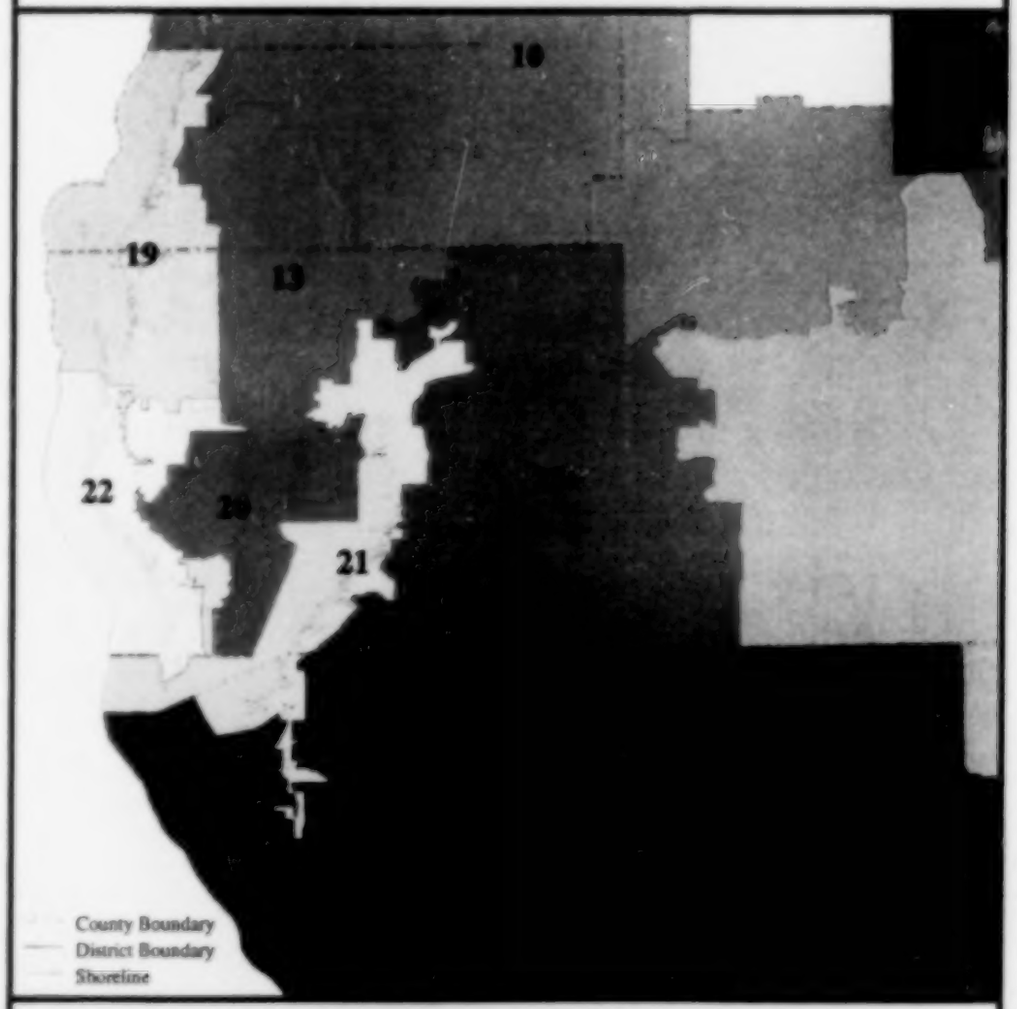
APPENDIX B

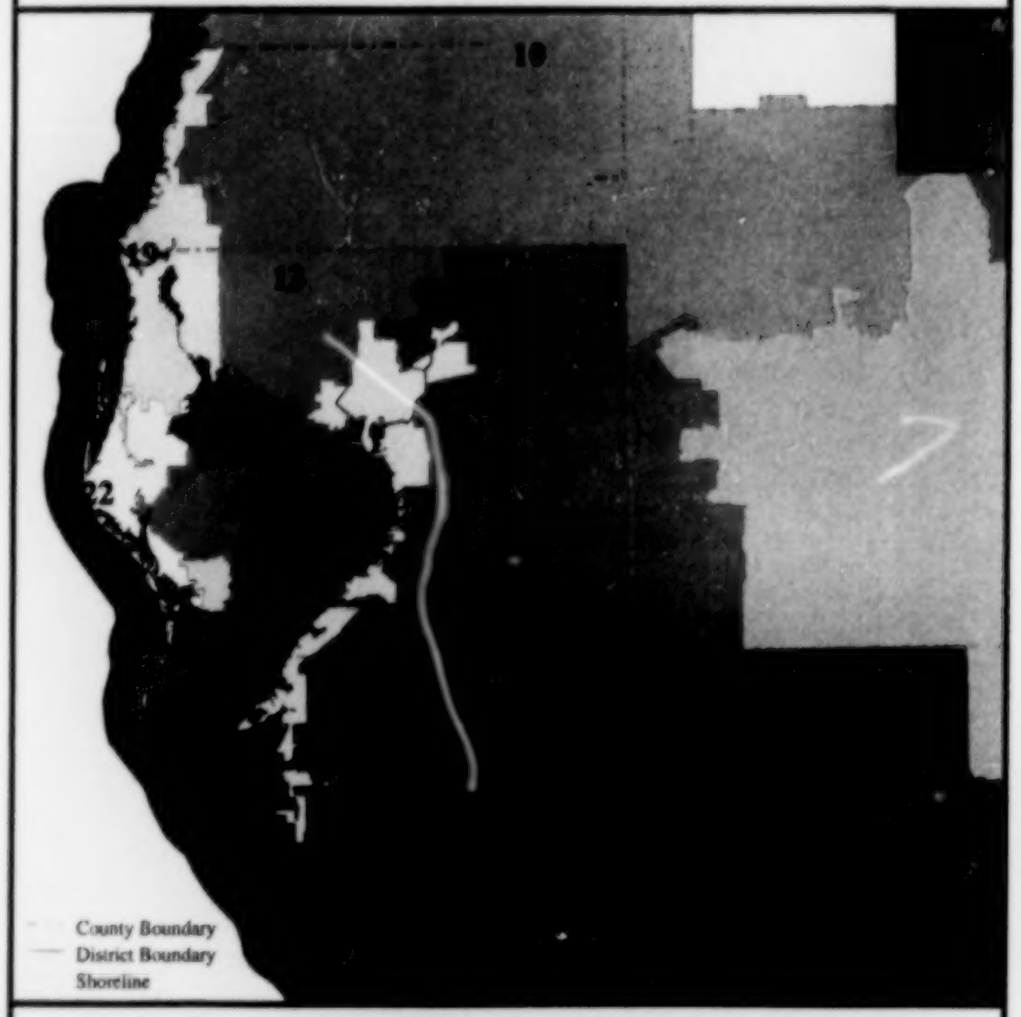
1996 SENATE
PLAN 386
TAMPA BAY AREA



JLMC Economic and Demographic Research Division

APPENDIX C

1996 SENATE
PLAN 386
TAMPA BAY AREA



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APPENDIX D